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APPELLATE CASE NO 59211-4-I

COURT OF APPEALS
DIVISION ONE,
OF THE STATE OF WASHINGTON

SANDRA LAKE

Appellant

v.

WOODCREEK HOMEOWNERS ASSOCIATION,
A Washington homeowners association

And

GLEN R. CLAUSING,
a single man

Respondents

RESPONDENT GLEN R. CLAUSING'S SUPPLEMENTAL BRIEF IN ANSWER TO APPELLANT LAKE'S SUPPLEMENTAL BRIEF REGARDING ATTORNEY FEES.

Attorneys for Respondent Clausing:

Oseran, Hahn, Spring & Watts., P.S.
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TABLE OF AUTHORITIES

198 Cal. Rptr. 447, 150 Cal. App.3d 1184 (1984)

Relief Requested

Respondent Clausing respectfully requests that this court uphold Judge North's decision in awarding Respondent Clausing, as the prevailing party, reasonable attorney fees as provided in RCW 64.34.455.

Counter-Statement of Issues Raised by Appellant Lake In Her Supplemental Brief

1. Basis of Award. Did the trial court abuse its discretion when it determined this was "an appropriate case" for awarding attorney fees to Respondent Clausing as the prevailing party as provided in RCW 64.34.455?
2. Amount of Award. Did the trial court abuse its discretion by taking into account the legal services rendered by attorney/respondent Glen Clausing in assisting his attorney of record, Charles E. Watts, in its determination of the amount representing "reasonable attorney fees?"
3. Adequacy of Record. Did the trial court enter Findings of Fact and Conclusions of Law that were so "unclear" and "confusing" as claimed by Appellant Lake that it is necessary to remand this matter to the trial court to enter new Findings of Fact and Conclusions of Law and/or to determine for a

second time an amount that represents reasonable attorney fees?

Argument

Appellant Lake, in her original opening brief, revised opening brief, reply brief and her supplemental brief has not disputed that Respondent Clausing was the prevailing party. Respondent Clausing in his original brief set forth: The trial court's basis for the award of reasonable attorney fees was RCW 64.34.455; that RCW 64.34.100 provides that the remedies afforded in Chapter 64.34 (including its provision in 64.34.455 for an award of reasonable attorney fees to the prevailing party) are to be liberally construed; and that the determination of whether a case is an appropriate one for an award of attorney fees and the determination of the amount that is a reasonable attorney fee are both matters within the broad discretion of the trial court. *Condo Owners v. Coy,* 102 Wn. App 697, 9 P.3d 898, (2000); *Homeowners' Ass'n v. Hal Real Estate,* 108 Wn. App. 330; 30 P.3d 504 (2001). [See Respondent Clausing opening brief pages 45-53]

The standard of review of Appellate Lake's assignment of errors in her supplemental brief is for *an abuse of* the trial court's discretion. Under this standard of review, the appellate court will

not reverse or remand a trial court's decision unless (and only if) the appellate court concludes no reasonable person would take the same view as the trial court. *McGreevy v. Oregon Mut. Ins. Co.* ,90 Wn. App 283, 951 P.2d 978 (1998); *Somsak v. Criton Techs/Heath Tecna, Inc.,* 113 Wn. App. 84, 52 P.3d 43 (2002); and *Hope v. Larry's Mkts,* 108 Wn. App. 185, 29 P.3d 1268 (2001). Only if Judge North's decision was "manifestly unreasonable or based upon untenable grounds or reasons" should it be reversed. *Metropolitan Mortgage v. Becker,* 64 Wn. App 626, 825 P.2d 360 (1992) quoting *Progressive Animal Welfare Soc'y v. UW,* 114 Wn.2d 677, 790 P.2d 604 (1990). See also: *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 482 P.2d 775 (1971); *Boeing Co. v. Sierracin Corp.,* 108 Wn.2d 38, 738 P.2d 665 (1987); and *Hope v. Larry's Mkts.,* 108 Wn. App. 185, 29 P.3d 1268 (2001).

Appellant Lake, in none of her briefs, has set forth any fact, ground, or reason that establishes Judge North's decision that this was an appropriate case for an award of attorney fees as provided in RCW 64.34.455 was one no reasonable person would reach. She has not stated in what way Judge North's decision was manifestly unreasonable or how he (purportedly) based his decision on untenable grounds. Appellant Lake merely states a (naked)

legal conclusion "the trial court abused its discretion" and then restates this same legal conclusion as "argument" in support of it.

Judge North based his decision on the undisputed facts and legal authority set forth in the following documents: Respondent/Defendant Clausing's Motion for an award of attorney fees, (CP 863-891); the Declaration of Charles Watts dated December 1, 2006, (CP 892-895); Declaration of Glen R. Clausing dated December 1, 2006, (CP 919-941), Declaration of Marianne Jones dated December 8, 2006, (CP 961-971), Declaration of Glen R. Clausing dated December 10, 2006, (CP 972-978); Appellant/Plaintiff Lake's Memorandum of authority and argument in opposition to the motion, (CP947-960); Appellant Woodcreek's Memorandum of authority and argument, (CP 942-946); and Reply Briefs of Respondent/Defendant Clausing, (CP978-989). After reviewing these materials, Judge North then exercised his discretion and concluded Respondent Clausing was entitled to an award of reasonable attorney fees as provided in RCW 64.34.455.

The amount of attorney fees awarded by Judge North in his discretion took into account the services (nature, time and value) rendered by attorney Glen Clausing in assisting his attorney of record, Charles E. Watts. Glen Clausing shares office space with

Mr. Watts' firm and has been in practice for over 25 years. He has tried cases in Washington, in other states, in various federal courts, and before administrative agencies. (CP 972) Under the supervision of Mr. Watts, Glen Clausing performed the bulk of the legal services that were required in this case. (CP 892-893)

Mr. Watts billed Glen Clausing for the legal services he provided in this case and his bills were paid by Glen Clausing. (CP 892-893) Glen Clausing did not bill Mr. Watts for the legal services he rendered though he kept track of his time in the same manner as he does for any client. (CP 900-909) Sending a bill to Mr. Watts for his legal services would have been rather redundant (if not silly) as, upon receipt of such a bill, Mr. Watts' would simply add Glen Clausing's charges to his own bill (as a cost advanced to contracted counsel) then submit it to Glen Clausing for payment. When Glen Clausing made his payment to Mr. Watts, then Mr. Watts would pay Glen Clausing using Glen Clausing's remittance. After the "smoke all cleared," both Mr. Watts and Glen Clausing would be in the same financial position that they are now by Glen Clausing keeping track of his time/services but not actually billing Mr. Watts.

Respondent Clausing requested an award of approximately $59,000 in attorney fees. (CP 863) Judge North, in the exercise of his discretion, decided that a total of $30,000 (plus recoverable costs) was reasonable. (CP 990-992) His decision to award fees and the reasons why he did not award the total amount requested are supported by the Findings of Fact and Conclusions of Law that were subsequently entered. (CP 1009-1013) The Findings of Fact and Conclusions of Law establish his decision was one that a reasonable person could have made and that Judge North based his decision on tenable and reasonable grounds.

Ms. Lake argues that because Glen Clausing was not actually paid and because he was not the attorney of record it was an abuse of discretion for Judge North to consider the work done in assisting Mr. Watts in making his decision regarding the amount that represented a reasonable attorney fee. Ms. Lake is simply wrong that actual payment of fees and/or a notice of appearance are prerequisites to being entitled to an award of reasonable attorney fees. The appellate courts of Washington, California, Colorado, Michigan, Montana, New Jersey, New York, and Oklahoma have held that attorneys who are not paid, either because they rendered their services for free or because they

represented themselves, are entitled to reasonable attorney fees: fees based on time spent and prevailing billing rates in the community. [1] The same result has been reached in the 5th, 9th and 11th Circuit Court of Appeals.[2] In all these cases, the award of reasonable attorney fees was in a situation where the attorney actually performing the services was not paid and/or the client was not billed.

In the Washington case, *Metropolitan Mortgage v. Becker,* 64 Wn. App. 626, 825 P.2d 360, (1992) the court upheld an award of reasonable attorney's fees (fees calculated based on time spent and hourly billing rates in the community -- the Lodestar method) though the prevailing party was represented by salaried in-house counsel. In the 9th Circuit case, *Ellis v. Cassidy*, 625 F. 2d 227 (9th Cir. 1980), the court examined recovery of attorney fees not actually paid by the prevailing party and also the issue of whether

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[1] *Metropolitan Mortgage v. Becker,* 64 Wn. App 626, 825 P.2d 360 (1992); *Garfield Bank v. Folb,* 31 Cal Rptr.2d 239, 25 Cal. App.4th 180 (1994); *Leaf v. City of San Mateo,* 198 Cal. Rptr. 447, 150 Cal. App.3d 1184 (1984); *Renfrew v. Loysen,* 175 Cal. App.3d 1105, 222 Cal.Rptr. 413 (1985); *Zick v. Krob,* (Colorado Court of Appeals, Div. III) 872 P.2d 1290; *Wells v. Whinery,* 34 Mich. App 626, 192 NW2d 81 (1971); *Winer v. Jonal Corp.* 169 Mont. 247, 545 P.2d 1094 (1976); *Brach v. Ezekwo,* (Superior Court of New Jersey, Appellate Div.) 783 A.2d 246 (2001); *Rutherford v. Semenza,* 254 NY Supp. 876 (1932); and *Weaver v. Laub* (Supreme Court Oklahoma) 1977 OK 242, 547 P.2d 609 (1977).

[2] *Fariley v. Patterson,* 493 F.2d 598 (5th Cir. 1974); *Ellis v. Cassidy,* 625 F.2d 227 (9th Cir. 1980); and *Duncan v. Poythress,* 777 F.2d 1508 (11th Cir. 1985).

an attorney providing services on his/her own case is entitled to recover those fees. The court held:

> "Appellant next contends that attorneys' fees should be denied to certain appellees who are attorneys and who represented themselves. . . Here we conclude that the award was proper. The award of attorneys' fees in this case furthers the underlying policy of discouraging frivolous or harassing litigation. [citations omitted] The appellees have actually suffered pecuniary loss, since they have been required to take time away from their practice to prepare and defend the suit. See Winer v. Jonal Corp., 169 Mont. 247, 545 P.2d 1094 (l976). Legal services have actually been performed. See Wells v. Whinery, 34 Mich. App. 626, 192 N.W. 2d 81 (Mich. 1971). The difficulty of placing a dollar value on the legal services performed, present in the situation where a lay defendant represents himself, is largely absent in the case of an attorney who has established fees and billing practices. Further, these appellees did not seek out a change for pro se litigation to compensate for an inactive practice; they were forced to defend against frivolous claims made by a plaintiff who is apparently bent on endless litigation. We conclude that attorneys' fees were properly awarded." [*emphasis added*]

In *Renfrew v. Loysen,* 175 Cal. App 3d 1105, 222 Cal. Rptr. 413 (1985) the California Court of Appeals overturned the trial court's denial of Renfew's motion for an award of attorney fees as the prevailing party in an action she handled for herself based on a contract for legal services with her client. At page 1110:

> "To allow respondent to escape her obligation to pay the attorney's fees required under the contract simply because the attorney chose to rely on her own professional skill rather than hire another attorney would create a windfall for the client at the direct and tangible expense of the prevailing

> party-attorney. We find no justification for such a rule. Equity and common sense dictate our conclusion that appellant Renfew should not be denied compensation for the reasonable value of her time as attorney in litigating her own claim against respondent. The determination of what constitutes reasonable attorney's fees is committed to the discretion of the trial court . . . The trial court in the present case must utilize its expertise and discretion to determine the reasonable value of attorney Renfew's services in the litigation of her fee collection action against respondent Loysen."

It is inescapable that if Glen Clausing had not performed the work he did, it would have been necessary for another attorney to perform that work. Judge North did not err in considering Glen Clausing's legal services in assisting his attorney of record in light of cases cited above and in the materials presented to him before he made his decision. Judge North exercised his discretion and determined the amount that represented a "reasonable attorney fee." He awarded this amount to Respondent Clausing as the prevailing party.

Glen Clausing did not file a Notice of Appearance in this case. Charles E. Watts, did. The only purpose or function of a notice of appearance is to prevent a default judgment from being entered against the defendant without notice. RCW 4.28.210, *Smith v. Arnold,* 127 Wn. App 98, 110 P.3d 257 (Div.2 2005). Ms.

Lake has cited no authority (because none exists) to support her arguments that a notice of appearance serves the other purposes she claims it does such as to alert one to the reputation of opposing counsel, to aid in evaluating a case, or a factor in assessing the risks of litigation. Likewise, and for the same reason, she has not cited any authority for her proposition that a notice of appearance is something a trial court should consider or verify was filed before it can properly make an award of reasonable attorney fees provided by statute to the prevailing party.

Finally, Appellant Lake should not be able to avoid being assessed reasonable fees and receive a windfall because Glen Clausing is a practicing attorney. As stated by the Supreme Court of Montana:

> "****It can make no difference to the defeated party, who is by law bound to pay the costs of the attorney of the prevailing party *** whether that attorney is the prevailing party himself or another attorney employed by him."
>
> [*Winer v. Jonal Corporation,* (Supreme Court of Montana), 169 Mont. 247, 545 P.2d 1094 (1976).]

The record addressed in Appellant Lake's Supplemental Brief, Judge North's Findings of Fact and Conclusion of Law (CP 1009-1013) are not confusing or unclear. Judge North found that

$30,000 was a reasonable attorney fee in this matter to be awarded Respondent Clausing. This is the amount set forth (consistently) in the Judgment Summary (CP 990), the Order of Judgment (CP 991-992), and the Findings of Fact and Conclusions of Law. Remand of this case to enter new Findings of Fact and Conclusions of Law because counsel for Appellant Lake believes better grammar or language could have been employed is unwarranted and a totally wasteful use of judicial resources.

Judge North's decision that this was an appropriate case for an award of attorney fees as set forth in RCW 64.34.455, and his decision as to the amount that represented a reasonable attorney fee were in all respects proper and a valid exercise of the trial court's discretion. Respondent Clausing respectfully requests that this court uphold his award of attorney fees to Respondent Clausing.

Dated August 23 2007, and respectfully submitted,

OSERAN, HAHN, SPRING & WATTS, P.S.

by Charles E. Watts

Charles E. Watts, WSBA 2331
Attorney for Respondent Glen R. Clausing

PROOF OF SERVICE

TO: Clerk, Division One, Court of Appeals

AND TO: Appellant Lake

PLEASE TAKE NOTICE that on the 24th day of August 2007, Respondent Glen R. Clausing's Supplemental Brief In Answer to Appellant Lake's Supplement Brief Regarding Attorney Fees (original and one copy) was filed with Division One, Court of Appeals and served via U.S. Mail, portage pre-paid on the following:

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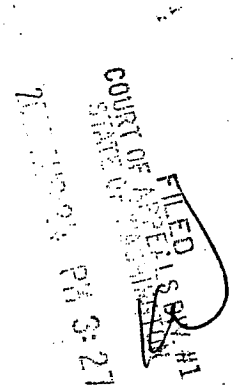

Dated this 24th day of August 2007.

Lea Martin

Lea Martin, Legal Assistant